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September 17, 2018

Jeff S. Jordan
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
1050 First Street, NE
Washington, DC 20463
VIA EMAIL at cela@fec.gov

Re: MUR 7432: Response to Complaint from Outsider PAC

Dear Mr. Jordan:

I am writing this letter on behalf of Outsider PAC and Julie Dozier in her official capacity as Treasurer (the "PAC") in response to your letter regarding the Complaint filed in the above-referenced matter by Justin L. Brown. At the outset, Mr. Brown is the treasurer for Sandy Pensler for Senate, and it should be obvious to the Commission that this matter is nothing more than a political stunt by a once-floundering (and now failed) Senate candidate to generate negative publicity for his opponent, John James. The Complaint contains nothing but speculation and innuendo, and the allegation that the PAC and the James Campaign coordinated by sharing footage of Pensler criticizing President Trump (or in any other way) is patently false. As explained below, the PAC did not coordinate with the James Campaign and did not republish campaign materials. Accordingly, the Commission should find no reason to believe a violation occurred.

I. The Complaint.

The Complaint strains to allege two violations of Commission rules and regulations: 1) that the PAC republished campaign material from the James Campaign, and 2) that the PAC and the James Campaign coordinated by sharing footage of Sandy Pensler, and consequently, that the PAC made, and the James Committee received, unreported and over-the-limit in-kind contributions.

These allegations appear to be based, although it's not particularly clear because of the incoherent nature of the Complaint, on Pensler's media consultant's review of the timing a James

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Campaign ad featuring footage of Pensler was aired on television and placed on YouTube, and when the PAC's ad featuring similar Pensler footage later aired. The Complaint makes a passing statement that the PAC's and the James Campaign's ads "use nearly identical language and graphics." Finally, the Complaint also seems to base its coordination allegation on the fact that the James Campaign and the PAC use a common media consultant, Grand River Strategies.

II. Legal Standard.

Under the Federal Campaign Act of 1971, as amended (the "Act"), "the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or authorized agents shall be considered an expenditure." 52 U.S.C. § 30116(a)(7). Commission regulations further provide that the republication of campaign materials "prepared by the candidate, the candidate's authorized committee, or an agent of the foregoing" is considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure. 11 C.F.R. § 109.23(a). Under Commission regulations, however, the candidate who prepared the materials is not considered to have received an in-kind contribution and is not required to report an expenditure, unless the republication is a coordinated communication under 11 C.F.R. §§ 109.21 or 109.37. *Id.* § 109.23(a).

A communication is coordinated with a candidate, a candidate's authorized committee, or agent of the candidate or committee when the communication satisfies the three-pronged test set forth in 11 C.F.R. § 109.21(a): (1) the communication is paid for by a person other than that candidate or authorized committee; (2) the communication satisfies at least one of the content standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the conduct standards set forth in 11 C.F.R. § 109.21(d).

The Commission's regulations set forth the following six types of conduct between the payor and the committee that satisfy the conduct prong of the coordination standard: (1) the communication "is created, produced, or distributed at the request or suggestion of a candidate or an authorized committee," or if the communication is created, produced, or distributed at the suggestion of the payor, the candidate or authorized committee assents to the suggestion; (2) the candidate, his or her committee, or their agent is materially involved in, inter alia, the content, intended audience, or means or mode of communication; (3) the communication is created, produced, or distributed after at least one substantial discussion about the communication between the person paying for the communication, or that person's employees or agents, and the candidate or his or her authorized committee, his or her opponent or opponent's authorized committee or a political party committee; (4) a common vendor uses or conveys information material to the creation, production or distribution of the communication; and (5) a former employee or independent contractor uses or conveys information material to the creation, production, or distribution of the communication. 11 C.F.R. § 109.21(d)(1)-(5). A sixth conduct prong instructs that the dissemination, distribution, or republication of campaign materials may satisfy the conduct prong if one of the other five conduct prongs is also satisfied. *See* 11 C.F.R. § 109.21(d)(6); Coordinated and Independent Expenditures, 68 Fed. Reg. 421,439 (Jan. 3, 2003).

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Commission regulations provide a safe harbor when using a common vendor, which states that none of the conduct standards are met if the common vendor "has established and implemented a [written] firewall" that is "designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communications and those employees or consultants currently or previously providing services to the candidate." 11 C.F.R. § 109.21(h).

Finally, in Matters Under Review such as this, the Commission may find "reason to believe" only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act. *See* 11 C.F.R. § 111.4(a), (d). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true. *See* MUR 4960, Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons (Dec. 21, 2001).

III. Discussion.

All of the allegations in the Complaint can be easily set aside because they have no foundation in fact or law. First, any suggestion that the only way the PAC could have gotten the footage of Pensler used its ad was by coordinating with the James Campaign or by using footage directly from the James Campaign's television ad is incorrect. A quick Google search reveals that the Pensler footage has been posted to numerous websites, including a April 20, 2018 Daily Caller article from which the PAC actually obtained the footage.¹ In other words, the footage was publicly available for almost three months before the dates the Complaint alleges the James Campaign used it in its television ad and posted the footage to YouTube.²

Additionally, the PAC did not coordinate with the James Campaign. Although they used a common vendor, Grand River Strategies, the vendor has a firewall in place designed to prevent the flow of information between its employees who work separately for the PAC and the James Campaign. For these reasons, the Commission should find no reason to believe a violation occurred.

a. The PAC did not republish campaign materials.

The Complaint alleges that the PAC made a prohibited in-kind contribution to the James Campaign by using footage of Pensler taken from a James Campaign ad, and by creating an ad that that "use[d] nearly identical language and graphics." First, as discussed, the PAC did not obtain the footage of Pensler from the James Campaign's ad, but instead from a publicly available media source. In MUR 6821, the Commission explained that "a communication resulting from ... the use of publicly available information ... does not satisfy the conduct prong."³ Here, the PAC obtained the Pensler footage from a public source. Therefore, it did not republish campaign materials.

¹ http://dailycaller.com/2018/04/20/sandy-pensler-trump-fourth-grader/?utm_medium=social.

² The PAC has no knowledge of where the James Campaign obtained the Pensler footage.

³ MUR 6821 (Shaheen for Senate), Factual & Legal Analysis at 7-8.

The allegation that the PAC's ad was "nearly identical" to the James Campaign's ad is also false. While they shared a similar theme regarding Pensler's negative comments about President Trump, this made up only a small portion of the PAC's ad. The remainder of the PAC's ad focused on James's desirability as a candidate and differed greatly from the James Campaign's ad, which focused entirely on Pensler. No reasonable viewing of the two ads could reach the conclusion that they were "nearly identical."

Again, in MUR 6821, the Commission explained that "alleged thematic similarities of [] two communications at issue and their rough temporal proximity do not give rise to a reasonable inference that any of the conduct standards were satisfied ..., particularly where no other information suggests that the Respondents engaged in any of the activities outlined in the relevant conduct standards."⁴ It should come as no surprise (except, perhaps, to Pensler) that a candidate's position on President Trump has been an important issue in many 2018 Republican primary elections, and Michigan was no different. The fact that the PAC and the James Campaign each ran ads that focused on Pensler's negative comments about President Trump is evidence of nothing other than that it was an issue widely discussed in Michigan's GOP primary. Again, thematic similarities and temporal proximity, without more, are not enough to satisfy the conduct standards. Here, because there is no information suggesting that the PAC and the James Campaign engaged in other activities that could satisfy the conduct prong, the Commission should find that there is no reason to believe a violation occurred.

b. The PAC's vendor had a firewall in place to prevent coordination.

The Complaint alleges that the PAC and the James Campaign coordinated by using a common media vendor, Grand River Strategies. This allegation is not supported by the facts or law. As discussed above, Commission regulations provide a safe harbor for the use of common vendors, which states that none of the conduct standards are met if the common vendor "has established and implemented a [written] firewall" that is "designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communications and those employees or consultants currently or previously providing services to the candidate." 11 C.F.R. § 109.21(h). Grand River Strategies has such a firewall in place.

Attached as Exhibit A is the firewall policy of Grand River Strategies. The document speaks for itself and requires no further explanation, other than to state that it clearly complies with the Commission's requirements, and as such, falls within the Commission's safe harbor for common vendors. Because the safe harbor applies, there was no coordination between the PAC and the James Campaign for using a common vendor. The Commission should find no reason to believe a violation occurred.

c. Conclusion.

As explained above, the allegations in the Complaint are not supported by the facts or law. We therefore respectfully request that the Commission recognize this insufficiency and find

⁴ *Id.* at 8.

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no reason to believe a violation occurred. Thank you for your prompt consideration of this matter, and please do not hesitate to contact me directly at (202) 640-6684 with any questions.

Respectfully submitted,

[Handwritten signature]

Derek H. Ross
Counsel to Outsider PAC

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Memorandum for Grand River Strategies Employees
From: Jamie Roe and Stuart Sandler
Subject: Communications Policy concerning activities on behalf of John James for United States Senate and Outsider PAC
Date: May 25, 2018

All employees of Grand River Strategies LLC are hereby instructed to restrict the flow of information concerning activities taken on behalf of the John James for United States Senate campaign and/or Outsider PAC to any employee providing consulting services on behalf of the other entity concerning paid communications or campaign plans. These restrictions shall apply to restricting any such similar flow of information to any staff member or consultant outside the firm providing services to the John James for United States Senate campaign or to Outsider PAC pertaining to the candidate's or Outsider PAC's campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication.

Stu Sandler may communicate with and provide information to only to the John James for Senate campaign staff and consultants and must not provide any such communications and information to anyone connected to Outsider PAC.

Jamie Roe may communicate with and provide information to only to Outsider PAC staff and consultants and must not provide any such communications and information to anyone connected to the John James for United States Senate campaign.

This policy shall be in place from this date until the conclusion of services being rendered by Jamie Roe and Stu Sandler to either Outsider PAC and the John James for United States Senate Campaign respectively.